THE ATTAINT.[a]

The assize of novel disseisin originally lay against the disseisor in possession in favor of the disseisee, and was soon extended to the heir of the disseisee, but not against the heir or grantee of the disseisor. But the disseisor might be dead or might have conveyed the land, and in such a case the disseisee would be driven to the writ of right with its delays and chance of battle. But the cases where the defendant had come into possession under a lawful title which was limited in time and had ceased to exist, *i. e.,* cases where there was no disseisin except constructive but an unlawful retention of possession were also wholly unprovided for. The judges and their clerks were busy remedying these defects, and they invented what came to be called writs of entry. They were given to the claimant out of possession, and like the assize, the writ defined the issue. The writs, without noticing the *Quibus,* were of two kinds: (1) where the seisin of defendant in possession originated lawfully, as in cases of discontinuance and deforcement, and (2) where his seisin originated unlawfully as in cases of abatement, intrusion and disseisin. All the writs defined the issue by saying that the defendant in possession "has not entry except through" (*non habet ingressum nisi per*) a certain person and then stated the defect in the title.

Against the disseisor the novel disseisin lay. But against the grantee (*foeffee*) or heir the writ was invented, assigning no entry except through (*per*) a certain person who disseised plaintiff or his ancestor. Next, it was extended to the heir's or grantee's heir or grantee by the phrase "no entry except through" (*per*) a certain person to whom (*cui*) the disseisor granted or who was the disseisor's heir. Here the writs stopped; they would not go beyond the third party inclusive (*usque ad tertiam personam inclusivam*),[28] according to Bracton. The reason given was that the writ would be going back to a time as to which the jury could not be expected to know the facts. But almost while Bracton was writing a statute[29] extended the remedy beyond the third person from the disseisor to any one who came in after (*post*) the disseisin if under the disseisor's

[a] Continued from the November issue.

[28] The word "inclusive" means including the disseisor at one end and the heir's or grantee's heir or grantee at the other end. See 2 Pollock and Maitland 62, which is confusing in speaking of a fourth degree as to which there is no reason, and 3 Holdsworth's Hist. of Eng. Law, 8 is not very clear. The writs taken from the register are printed in 3 Holdsworth, 497.

[29] Statute of Marlborough, cap. 29 (1267).

seisin. And so the writs were called in the *Per,* in the *Per* and *Cui,* and in the *Post.*

Now it is apparent that these writs of entry could be converted into a writ of right if the defendant could admit his entry under the circumstances stated in the writ and plead, by saying he had better right than the plaintiff. This would have ousted the writ of right and trial by grand assize and the Norman's claim of the battle. Naturally, therefore, the defendant was limited (1) to denying the right of entry assigned to him. He could not plead an inception of title older than that assigned. If he denied the entry assigned and the jury found his denial true, he won the case. But he could also (2) admit the right of entry assigned to himself by plaintiff and plead matter subsequent in time to the inception of the entry assigned. In this way the writs of entry were kept possessory and did not oust the proprietary writ of right.

The judges in inventing these writs and forms of action, forced the plaintiff to say in his pleading that he put himself, as to his claim, upon the country, *i. e.,* a jury. And the defendant, in order to plead in denial was forced to say that he also put himself upon the country, or if he pleaded new matter in avoidance, the plaintiff in denying put himself on the country as to the new matter, and the defendant did likewise and so on. Thus early began the conclusion of the common law declaration and the *similiter* and the rule that a pleading alleging new matter concluded with a verification, but if it simply denied or traversed, it concluded to the country. But the imposition of the jury was enforced also in all other actions where it could be used, especially in the various actions of trespass and a little later in trespass on the case, as well as in debt and detinue. All this was judicial legislation of the most enlightened kind. But it was plain that as to the petty assizes, the twelve men were imposed by governmental authority; while as to the jury the ostensible reason for their presence was an agreement of the parties.

To apply this situation now to the attaint, we notice that the attaint was not given as to the jury verdicts but only as to those of the assizes. The difference in procedure was plain. The writ of assize defined the issue and called the defendant into court along with the twelve. While the other process required preliminary pleading, a defining of the issue and a *venire facias* for the jury after a definite issue was made. Bracton says that the attaint does not lie against a jury because both parties have agreed to submit the

controversy to the proof by the jury and no one should be heard to attack the twelve witnesses whom he has agreed to be bound by.[30] But this is no reason at all. The twelve in the assize and the twelve on the venire were selected by the sheriff. The parties did not name them or any particular twelve witnesses. The fact was that the judges felt that having forced the parties to jury witnesses, they could not stultify their own work by allowing an assault upon the witnesses. Probably back of it all was the feeling that an attaint prolonged the litigation. It is to the interest of the state that there be an end to litigation, is a maxim of great power in English law. So despite the fact that there was just as much necessity for an attaint in case of jury as in case of assize, the judges were not prepared to extend the common law remedy for attaint to the new field.

The same thought of not prolonging litigation underlay the self-evident proposition, which seems strange to legal authors, that the writ of attaint was not issued of course (*de cursu*) out of the chancery, but by special indulgence of the king. This does not mean that the king personally, as a matter of partiality, granted it when he pleased, but rather that the application was made in the chancery and the officers there, after a showing and a consultation with the judges, issued the writ, or did not issue it as seemed best. It would have seemed as intolerable then as it would be today that a litigant, as a matter of course, as soon as a verdict was returned against him, could allege a false oath and at once have a jury of twenty-four knights to pass anew on the issue. The verdict then and now was *prima facie* correct. The law could not in reason provide that the incorrectness of the verdict should at once be assumed and writ of attaint at once issued. A showing was required, and very reasonably required before it would be issued.

A statute was passed at once that made short work of Bracton's fanciful reason for discrimination. By Westminster I,[31] which was one of Edward I's great reforming statutes, it was provided "that henceforth the king of his office shall grant attaints upon inquests in plea of land or of franchise or of thing touching the freehold when it shall seem to him that there is need." The same restraint upon the issuance of the writ is shown here. The writ does not go

[30] Bracton 290b. The explanation in 2 Pollock and Maitland, 621, that the jurors were like the witnesses in wager of law, seems fanciful. Men as acute as the lawyers of that day knew the difference. Soon the judges were calling the witnesses in wager of law a lot of rascals.

[31] Cap. 38: Purvue est que de soresmes le Rei de son office dorra atentes sur les enquestes en plai de terre ou de franchise ou de chose que touche fraunk tenement quant il lui semblera que besoigne seit.

as a matter of course,[32] but, to the king, *i. e.*, to his judicial officers, it must be shown that there is need and the proof made must make a very strong showing of incorrectness in the verdict. In this respect the writ of attaint is exactly parallel to the present motion for a new trial. This statute was construed as extending (as no doubt it was intended) the remedy of attaint to the verdicts of jurors. The popularity of the attaint is now manifest and in a few years the author of the Mirror[33] will be clamoring to issue the writ of attaint out of the chancery without difficulty in order to attaint all false jurors in all kinds of actions, personal, real or mixed. The tendency to assume that a remedy, which works well when carefully guarded and applied, will be good in all cases when taken as a matter of course, is an incorrigible tendency of the human mind.

This statute does not speak of damages given in attaint. It gives the writ as it had been used, and damages were a part of the remedy by the common law, and both at the common law and under the statute of Westminster I, the damages of the plaintiff in the attaint were recoverable,[34] and there never seems to have been any hesitation in calling upon the jury of twenty-four to fix the damages of the plaintiff in the attaint when he prevailed. Likewise there never seems to have been any hesitation in giving the plaintiff in attaint full compensation for all that he had been compelled to pay by way of damages, amercement and costs by reason of the attainted verdict and judgment. It is a common feature of the proceeding.

But there is a question of damages midway between the reversal of the judgment and its affirmance. It may be that a party desires to say that while he does not dispute the verdict against him in the principal matter of the verdict, he wishes to allege that the amount of damages given against him was too large. In our motion for new trial, this is the ground of excessive damages. In the mediaeval law such damages were called "outrageous." Originally Bracton had stated that there could be no attaint in respect of the damages alone.[35] But in time the common law in its expansive powers made the practice of attaint meet this necessity, by giving the attaint for outrageous damages. The first mention of this matter is a warning of

[32] Coke's contention that this statute made the writ a matter of course is wholly untenable and it is strange that his extreme partisanship should not have seen the obvious objections to such a situation.

[33] Mirror of Magistrates (Sel. Soc.) 164.

[34] The cases in Bracton's Note Book show that the party injured by the false verdict obtains the seisin he has lost and the damages that he has paid on the former verdict as well as his damages by being disseised under the false verdict.

[35] Bracton 290b. No attaint as to damages alone was evidently the practice as shown by Berwick's words below.

the judge to a jury in the year 1304. Berwick, Justice,[36] tells the jury to find the damages of plaintiff, but warns them to be careful, for the attaint "nowadays" lies upon the damages. The practice was then evidently well settled; how long it had been in operation cannot be said.

But the law in its method was as practical as it is today. If the plaintiff, having recovered excessive damages, released all above a certain sum, a false oath could not be assigned on the damages released,[37] although by the confession of the party and by his release, the falseness of the verdict as to the damages was admitted. But the lawyers did not readily give up their attempt to hold the jury responsible for excessive damages, and as late as the reign of Henry VII (1499) the aggrieved party was attempting to prevent the jury from obtaining the defence of a plaintiff's release,[38] just as at the present time excessive damages are urged to show that the jury has been influenced by passion or prejudice in passing on the issues.

Difficulties in pleading the false verdict as to the excessive damages were bound to arise, and in one of the Year Books[39] a justice suggests a method of assigning the false verdict in trespass to goods, by saying that the party could allege that the goods were of a certain value and no more and in all the damages given above that value there was a false oath. The court in the early period could either reduce or increase the damages, a power under the common law which courts have lost, but no false oath could be assigned either regarding the damages as increased or the damages as reduced by

[36] Y. B. 30-31, Edward I (Rolls Ser.) 124. Thayer (Treat. Evid. 147) understands this proceeding against excessive damages to rest on the statute of Westminster I of 1275. But this cannot be true. The authority is the other way. Y. B. Pasch, 3 Henry IV, pl. 3, Coke 2 Inst. 130, Brooke Abridg., Attaint, 42.

[37] Y. B. 12 Edward IV, 56; Y. B. 14 Henry VII, 5.

[38] Y. B. 14 Henry VII, f. 5, 11 on a writ of attaint Sergeant Yaxley assigned the false oath in this, that the jury had assessed the damages in an action of trespass to the person (trans de battery) excessively (trope outrageousment). Yaxley argued, in answer to Keble's statement that the plaintiff had released six pounds of the ten pounds damages, that it was not reasonable that the act of the plaintiff should excuse the jury's false oath. But Fineux, C. J., held that loss was the basis of attaint.

[39] Y. B. 12 Edw. IV, 56, Fitzh. Att. 11. If a man recover excessive (outrageous) damages in trespass and the plaintiff releases parcel of the damages, the false oath cannot be assigned by the defendant if he brings attaint as to those damages released, for as to them he is not aggrieved, and one of the justices said that he could assign a false oath in this form, to-wit: that the goods were worth forty shillings or other sum which would be the true value in fact and if the damages assessed (taxes) were beyond that sum, he could assign the false oath in the excess and it was clearly agreed that, as to costs, no attaint lies. This statement as to costs must be understood as meaning the amount of costs, since they were fixed by the clerks.

the court.[40] This last case seems to suggest that in attaint a party prevailing could assign, as a false oath, that the damages were too small. Theoretically and practically there would be no difficulty in this proceeding and probably such cases existed but I have found none. Under our new trial practice, the only way in which a court can rectify insufficient damages, is by granting a new trial with a *venire de novo,* but the attaint met no such difficulty.

The inhibition against assigning an attaint upon the action of the judge during the trial in regard to damages, directs attention to another matter. We have noticed the case in Bracton's Note Book where a jury was attainted although forced to a certain verdict by the erroneous action of the justices. But it was soon settled that the jury could not be made responsible for the act of the judge unless they had rendered a general verdict on the whole issue by incorporating the judge's bad law into their verdict. Thus it was very early held that if the jury find a special verdict and refer the matter of law, as to whether there was a disseisin to the court and the matter of law be incorrectly decided by the court, no attaint lies against the jury for this is not their default but that of the court, yet if in the special verdict a matter be found falsely, attaint lies upon that matter.[41] Thus early the distinction between judicial error and a false verdict emphasized the witnessing and ignored the judicial function of the jury.

After the passage of the statute of Westminster I in 1275 it seems to have been held that the attaint was applied to the verdicts of juries involving the freehold, although as to this there has been doubt expressed.[42] It may be that a natural disinclination of the judges to extend the attaint led to a narrow construction of the statute. Perhaps they held that the word "inquests" did not include juries. The Mirror seems to say that attaints lay only as to assizes, but the available evidence is the other way. About this time and before the passage of any other statute, it is found that the chief justice in an eyre can grant writs of attaint as to verdicts of assizes or juries given in that eyre without any recourse being had to the

[40] Y. B. 9 Henry VI, 2b. Today a court can force a reduction of damages by the new trial. But the remittitur is the party's act in theory. Thus we see the "good old fiction" still in active operation. But the court should have the correlative power to increase the damages. Generally speaking, the only help for a party who claims damages given to be inadequate, is to submit to a new trial.

[41] 43 Ass. 41, Rolle Abridg. Att. (K) 2. This situation must have led to special verdicts. 3 Reeves, Hist. of Eng. Law (Finlason ed) 304, note (a) is incorrect in saying that no attaint lay on a special verdict. The case of Scoland v. Grandison, 1 Y. B. Eyre of Kent, infra, is a case of special verdict where the attaint was allowed.

[42] Y. B. 3 Eyre of Kent (Sel. Soc.) Introd. p. xl, vii.

chancery. The chief justice in eyre could act only through his power delegated by the king in the articles of eyre and hence it must have been true that the king out of the chancery could grant writs of attaint upon verdicts of juries,[43] if the judges could do so.

In the Year Book of the Eyre of Kent is found a picture of an actual trial as it took place, for the case seems to be accurately reported. In explanation of the word eyre, which is the Latin *iter,* it may be said that once in so many years the king's justices, under articles of eyre, were instructed to visit a certain county and try all the cases there, both civil and criminal and make investigation into all derelictions by individuals or public bodies. The visitation was considered an oppressive thing and at one time was limited to take place not more than once in seven years. In the year 1312 and 1313 the king's justices were holding such an eyre in the county of Kent.

Sometime before the eyre William de Grandison had brought a novel disseisin against Frank de Scoland, complaining that Frank had unjustly and without judgment disseised him. The trial turned upon an estate tail. These estates in tail had been created by the statute *De Donis.*[44] The statute probably adopted an older writ for a remedy and the judges devised three actions called formedon (*forme done* or *forma doni*) to enforce the statute. If the heir in tail sued he used the formedon in the *descender,* the remainderman brought formedon in the *remainder* and the reversioner would bring a formedon in the *reverter.* All these writs were necessarily based upon a deed which had created a fee tail and were on the title.

The facts as developed were that Frank de Scoland was the heir of Geoffrey de Scoland, an uncle. The uncle Geoffrey had an illegitimate son Richard, and the father gave to this son an estate tail in certain land. It was useless, of course, to grant him more, as a bastard could have only heirs of the body. This gift left Geoffrey owner of the reversion in fee, which would descend to Frank, his lawful heir. Richard died without heirs of the body after Geoffrey, the

[43] There is an assertion of such a power by Berwick, Justice, in Y. B. 30-31 Edward I, 124, who says, "There may be an attaint on the damages out of this court without the need of seeking it in the chancery." The note in the Eyre Year Book is carelessly made. On page 138 of Y. B., 3 Eyre of Kent (Sel. Soc.) it is said that upon all disseisins (verdicts or assizes?) the attaint may be had without a writ from the chancery. On page 205, Id. the note is that the chief justice can grant by his own writ an attaint upon any assize taken in the eyre. But the Y. B. 20-21 Edward I, some years before the Eyre of Kent Year Book, lays it down without qualification, that the justices in eyre can grant an attaint without a writ from the chancery. Y. B. 20-21 Edward I (Rolls Ser.) 108. The matter is of little importance on account of the statute of 1326 which was soon to be passed, but the conclusion that attaints upon verdicts of juries were covered by the statute seems to be warranted.

[44] State of Westminster II, cap. 1 (1285).

father, had died, and Frank, as the heir of Geoffrey, owner of the reversion, entered. But the lord of the fee was William de Grandison of whom Geoffrey held the land and he also had entered, claiming an escheat in this way: he said that Geoffrey, the father, after he had granted the fee tail to his bastard son Richard, had released the reversion in fee also to Richard, so that Richard, by merger of the fee tail in the reversion, had become the owner in fee of the land and he, being incapable of having general heirs and leaving no heirs of the body had left the estate without any one to inherit and hence it would escheat to the one of whom it was held, namely, William de Grandison, the lord of the fee. The assize found in favor of the release by a special verdict reciting the deed and the release and the facts.

Frank de Scoland now relying upon advice that formedon was a higher action than a novel disseisin, which tried the possession, and believing a jury would find no release, brought before this eyre a formedon in the *reverier*.[45] The defendant Grandison now orally pleaded in bar the judgment in novel disseisin as *res judicata*. Gilbert de Touthby, a celebrated serjeant, replying, said: "This formedon is a higher action on the title and is not upon the possession." As a matter of fact, however, the jury in the novel disseisin had found the deed and release specially and this issue was on the title and the issue on the formedon would be precisely the same as defined in the special verdict, namely, was there a release in fee by Geoffrey to the dead Richard. So Grandison's counsel said that Frank's remedy was by attaint, for as long as that judgment stood it was a bar.[46] Spigurnel, Justice, answered Touthby: "What you say, Gilbert, would be well enough if the assize had simply found a verdict of seised and disseised but they have by special verdict found all the facts as to title and upon them the justices have awarded the disseisin. Wherefore, if the attaint jury says that they had made a false oath concerning the release, the verdict of the assize would be sufficiently attainted by it appearing that William was not disseised." It begins to be apparent that if the issue in the possessory action is on the title, the court will consider the issue as what was actually passed upon. Here it is plain that the issue tried by the possessory assize was not possession but property. The possessory action of

[45] Y. B. 2 Eyre of Kent (Sel. Soc.) 189, 193, 197.

[46] In Y. B. 21-22 Edward I (Rolls Ser.) 428, a woman brought a writ of right and it was pleaded against her that she had brought a novel desseisin and the verdict and judgment were against her, therefore attaint was her remedy. But the defendant after making the objection pleaded over for the pleasure of the justices (pour le pleer des justices).

assize had been in effect as much proprietary as the writ of right or the formedon on the deed. Thus Frank was non-suited.

He now proceeded to London and must have shown the officials in the chancery that the release was a fraud, for he returned with a writ of attaint.[47] The sheriff summoned Grandison, the defendant in attaint, also the jury in the assize and the twenty-four law worthy (*legales*) knights. The writ assigned, generally, a false oath made by the twelve of the assize. Grandison and seven of the jury appeared, two of the jury were distrained and three were dead. Frank de Scoland's serjeant first stated the particulars wherein the oath was false (1) in finding the release, (2) in finding that Richard held of Grandison and did homage to Grandison and (3) in the matter of damages. The defendant Grandison was now ordered to state any reason why the attaint should not be taken.

The oral pleas for Grandison began. First the objection was made that all the twelve were not present. This was overruled as a matter of course, the law being that death of jurors did not destroy the remedy. The proposition that it did is as astonishing as would be a plea in bar by one burglar that his partner in crime was dead. Next it was objected that the judgment in the novel disseisin had never been executed by the payment of the damages and costs. This plea was disproven by inspection of the record. The next objection was that the writ of attaint was not presented at the opening of the eyre as required by the articles of the eyre. This was overruled, because the justices in the eyre could grant attaints themselves. Here one of the counsel for Grandison asked for a bill of exception on this plea,[48] but one of the justices replied: "We will make no bill, but you have the testimony of the whole court, so lodge your exception." Finally it was objected that the tenant of the land, the grantee of Grandison since the verdict in the assize, was made a party to the attaint, but had not been a party to the assize, and he was therefore not a proper party. This objection was overruled for the tenant was liable for the damages accruing since the assize.

Thereupon Hartlepool for Grandison said to the court: "By your leave we will imparl (consult) with the twelve of the first disseisin,"

[47] Y. B. 1 Eyre of Kent (Sel. Soc.) 158, 160.

[48] This proves that the Statute of Westminster II, cap. 31, which gives a bill of exceptions, was applicable originally to pleas offered in oral pleading and refused by the court. It had nothing to do with exceptions as we have them, for an exception then was a plea. See 13 Michigan Law Rev. 457 for an explanation of the whole matter of the early meaning of a bill of exceptions. The word exception in the statute and above means the pleading offered, not an objection reserved upon it. The translator has wholly mistaken the point by using objection for exception. He was to lodge his exception or plea written out.

i. e., the accused assize. Staunton, Justice, replied: "Pray do so." The defendants withdraw and return and now a new objection is made, that the false oath was assigned as to the release, tenure, homage and damages, but not to the whole issue of seisin and disseisin. Spigurnel ruled shortly: "All findings of fact are open to be attainted." And the defendant having exhausted his objections, the oath was administered to one of the twelve and to the others, one by one in succession. An oath was too solemn a ceremony to be administered in our method, to the whole jury together. Each juryman said: "Hear, ye Justices, I will speak the truth of this assize and of the freehold of which I have had the view by command of the king, and of the oath of the twelve and in naught will I fail."

Thereupon Spigurnel, the chief justice of the eyre, recited to the attaint jury the pleadings at the assize and the verdict of the twelve, and charged the twenty-four knights to say whether the twelve had made a false oath or not, in so far as they said that Geoffrey released to Richard all his right and that Richard held of Grandison and did homage to Grandison and in the matter of damages The twenty-four said that the twelve made a false oath, (1) as to the release, (2) as to the damages and (3) as to Richard holding of Grandison but not as to the homage. The judges at once ruled that the homage was immaterial because not owed. Then Spigurnel said: "Gentlemen, (*bons gents*),[49] tell us Frank's damages since the assize." The jury answered, "Seven score marks." Thereupon Frank was given his seisin, his damages of fifteen marks paid at the first assize, with his amercement and costs and one hundred and forty marks further damages. The nine jurors were ordered to prison, but they paid fines of from one to forty pounds.

This actual picture of an attaint trial shows a remarkably business-like way of holding court and differs from a trial today only in two particulars: first, the pleadings are oral, stated to the court and if disallowed are not a part of the record; and second, no evidence whatever is offered but the jury answer as witnesses out of their own knowledge. We see none of the interminable objections to evidence, nor do the serjeants for the respective parties make any statements to the jury.

Attaint was now a remedy growing in popularity. Wisely guarded, it was a desirable method of reversing an injustice. But soon one safeguard was removed by the statute of 1326.[50] False verdicts

[49] The translator of the Year Books translates "Bons gents" "good people." It is needless to say that twenty-four knights would not be addressed as if they were ordinary jurymen.

[50] Stat. 1 Edward III, cap. 6.

were probably numerous. Ignorance, prejudice or improper influence then, as now, would be certain to influence or to be used with a jury, and litigants naturally claimed that they were entitled to the attaint as a matter of right without making any preliminary showing in the chancery. Official discretion then as now was supposed to cover, and then as now did cover, much partiality and unfairness. The statute recites "great mischiefs, damages, and destruction of divers persons, as well as of the men of holy church by the false oath of jurors in writs of trespass" and then it is enacted that the writ of attaint be allowed for the principal matter and also for damages in trespass, and the chancellor is to grant such writs without speaking to the king. Behind this statute we can see the great ecclesiastical land-owners distraining upon their tenants and being sued in trespass for damages, and then appearing in court to face a hostile jury. The action of trespass has now entered upon its victorious career as trespass on the case, trespass on the case on promises (*assumpsit*), trover and conversion and trespass in ejectment whereby it was to cover almost the whole field of legal remedy. The statute did nothing new in giving the remedy as to the principal issue as well as to the damages, but it was new in the two respects of giving the remedy in all actions of trespass and of providing for the writ as a matter of course out of the chancery. Henceforth any one dissatisfied with a verdict could appeal to the attaint without making any preliminary showing as to the probable falseness of a verdict. It was still plain to the legislature and the courts that the jury were only witnesses to, not judges of, the fact.

The remedy continued to grow in popularity. But the theory was to give it only in cases where the damages exceeded forty shillings both on bills and writs of trespass.[51] This was a temporary expedient for in 1354 the limit was removed.[52] In the meantime the clamor continued for the attaint in all cases[53] until at last the author of the Mirror's wish came true, and in 1360 the remedy of attaint was granted as a matter of course in all pleas, real and personal.[54]

If Andrew Horn wrote the Mirror, he was a reformer before his time, but like most reformers he had taken a thing good under certain circumstances and by removing restraints upon its use had put it in the way of destruction. The opposite side of the picture was present to the judges. Verdicts assaulted as a matter of course, finality of decisions disturbed by any dissatisfied litigant led to the

[51] Stat. 5 Edward III, cap. 7.
[52] Stat. 28 Edward III, cap. 8.
[53] Thayer, Treat. Evid., 148.

allowance of dilatory proceedings against the writ. Where there were so many defendants, there was no limit to the delay.

The legislature tried to remedy the defect. The finding on a plea of one defendant was made to apply to all. But still "great, fearless and shameless perjury horribly continues and increases daily among common jurors of the realm," and the legislature turned to the expedient of increasing the qualifications of the attaint jurors.[55] This seems to be a strange expedient. There would have been some relevancy in increasing the qualifications of petty jurors, but the qualifications of attaint jurors were already high. The word knights was not a mere name. It called for a particular class of the gentry. But it was the old difficulty of attempting to make people honest by legislation. No safeguards were provided for the deliberations of the twelve jurors. They made up the verdict as they pleased. There were no means of correcting their findings by the court. The jury were, in theory, still witnesses and the only witnesses, and their verdict was a finality to the court. Bribery was, no doubt, a common incident. Government was growing weaker under Henry VI and this was the situation when the Wars of the Roses began in 1460, with the consequent unsettling of the ordinary affairs of life.

The courts, in the meantime, had been working with the proceeding by attaint. They found no difficulty in moulding the judgment so as to apportion the damages among the defendants.[56] Their attitude is reflected in the ruling that if a deed was set up and the witnesses to the deed were added to the jury, a proceeding that was the corollary of the jury of twelve witnesses and the result of the parties putting themselves upon the witnesses to the deed, there could be no attaint, because the witnesses to the deed upon whose information it was assumed the jury acted, could not be attainted.[57] This points clearly to the time when witnesses do not testify to the jury but must be added to the jury. But the jury might find against the deed and in that case it was held that the jury could be attaint-

[54] Stat. 34 Edward III, cap. 7.

[55] Thayer, Treat. Evid. 149.

[56] Y. B. Mich. 46 Edward III, pl. 5.

[57] Y. B. 20-21 Edward I (Rolls Ser.) 108; Y. B. 11-12 Edward III (Rolls Ser.) 338. Fitzh. Att. 26. At the Michaelmas term, 11 Ed. III, Sharshulle, Justice, said openly, that in case the witnesses to a deed are joined to the twelve, one shall never have attaint because the twelve cannot be attainted if the witnesses are not attainted and they shall not be because they are sworn to speak to their knowledge, while the jury are to speak the truth outright (a tout atrench). Fitzh. Att. 6 refers to a case in 6 Henry VI where the witnesses were dead. Coke, 2 Inst. 662 says that attaint lies if found no deed, but not where found a deed if the witnesses are joined to the jury. Rolle Abridg. Attaint (A) 14 to the same effect.

ed.[58] Then it was held that if a party had any other remedy than the attaint, if he could make the question he desired to be settled the basis of a cause of action, he could not have attaint.[59] So if in the litigation a fact was admitted to be true, no attaint lay upon the verdict as to that fact.[60] So it was held as to an immaterial fact or in regard to surplusage;[61] but if issue was joined as to a fact and the fact was found, whether it was immaterial or not, attaint lay upon the verdict.[62]

Of the attempt that was made to claim an attaint pending as a *supersedeas* the court made short work. The argument was, no doubt, that it would be unconscionable to enforce the judgment when it was alleged that the verdict was false, but the courts held to the proposition that the judgment was good until it was reversed by attaint.[63] The law was strict in holding that no one not a party to the verdict sought to be attainted, unless he be the heir or executor, could bring the attaint. The idea has profoundly affected the doctrine of *res judicata*. Passeley, whom the court in a Year Book addresses as a *"legist,"* (*i. e.*, one acquainted with the Roman Law) says that the reason why one not a party to a judgment may by averment, *i. e.*, by parol, adduce matter contrary to the fact established by the judgment, is that no one not a party to a verdict can bring attaint upon it.[64] Thus we have the original of the rule that judgments not *in rem* conclude parties and privies but not strangers. Likewise it was said in a Year Book that no attaint lies upon wager

[58] See preceding note. What was done when the witnesses testified against the deed and the jury believed them?

[59] Fitzh. Att. 4. At the Trinity Term 6 Henry VI where false oath was assigned in two things and it appeared that the party had a cause of action for them, by advice of all of the judges, he was denied attaint.

[60] Y. B. 11 Henry IV, 27. Rolle Abridg. Att. (I) 5. In trespass the defendant pleaded in abatement the misnomer of the vill in which the venue was laid. The old rule was that if a man pleaded in abatement and he lost the judgment was quod recuperet. This was the law in Illinois until recently. The issue on the venue was found against the party, but the jury also found the defendant guilty of trespass and it was held that attaint did not lie upon the finding of guilty of trespass, since that was admitted by the plea in abatement and could not have been in issue.

[61] Y. B. 14 Edward III (Rolls Ser.), 28; Rolle Abridg. Attaint (D) 1, 2.

[62] Y. B. 12 Henry VI, 6b.

[63] Y. B. 2 Henry IV, 18; Y. B. 2-3 Edward II (Sel. Soc.), 157. In a quare impedit against an abbot wherefore he impeded Bigot in his presentation, a judgment was given for Bigot. Then the abbot brought an attaint but Bigot died before the attaint was taken. Then a vacancy occurred in the benefice and the abbot again impeded, but the executors of Bigot brought a darrein presentment and the abbot pleaded an attaint pending, but it was held that this attaint did not affect the conclusiveness of the judgment until it was actually reversed, and the presentation was awarded to the executors without taking an assize.

[64] Y. B. 1-2 Edward II (Sel. Soc.) 113.

of law even alleging its falsity, and therefore where wager of law had been allowed as a defense but not waged and thereupon in the same case the parties joined issue and went to the country and then the wager of law was made and judgment had, no trial could take place by a jury upon the issue joined, because the one judgment might contradict the other.[65] There never was any question but that the heir of the party affected could bring attaint, and by statute the rule was extended so as to enable the reversioner to bring attaint upon a verdict against the life tenant.[66]

Under the Yorkist kings (1460-1485) more liberality was shown toward the attaint and a greater harshness toward trial juries, and this is noticeable in the strictness with which the verdicts were construed with reference to the pleadings. Thus the law was that if one pleads a right of common as appendant to land and this is traversed and put in issue and upon the trial he makes proof of a right of common time out of mind, saying nothing as to land, he has proven a right of common in gross and the defendant shall have attaint. Similarly, says the Justice, "if I and my ancestors have enjoyed a rent time out of mind as foresters of such and such a forest and I bring an assize for the rent, alleging seisin of such a rent, and the seisin as alleged is traversed or denied and I make title that I and my ancestors have had the rent time out of mind, without showing that we had it as foresters, and it be found against the defendant, he shall maintain the attaint;" and the same law is applied to a rent service alleged to be out of land and proof of a rent by prescription without showing that the land is held by it.[67] Here we note the good old rule now applied in indictments, that the allegation must be proven as laid; and if a thing be described with particularity, it must be proven in all that particularity. It is apparent that if a jury is to apply this rule on penalty of being held criminals if they violate it, the strictness of law has become rigorous injustice. But these cases are important to show that now proof of title is being made in court by evidence to the jury and the evidence given to the trial jury is being proven before the attainting jury to show that the trial jury made a false oath.

At this time, too, it was decided that the right to an attaint as to a verdict concerning land claimed by a fee tail, descended with the land. The release of the person prejudiced by the attaint could not

[65] Y. B. 2-3 Edward II (Sel. Soc.) 138. This assumes that no attaint could be brought against the witnesses in wager of law.

[66] Thayer, Treat. Evid. 148.

[67] Y. B. 10 Edward IV, 17.

affect the heir's right to bring it,[68] since the tenant in tail could not alienate the land to the prejudice of the heir in tail. The right to pursue the remedy survived to any surviving plaintiff in attaint. Even in the case of husband and wife, the right survived to the wife and did not pass to the husband's executors.[69] The old rule of assigning the false oath on the whole verdict without particulars, was steadily upheld. It was sufficient to say that the jury made a false oath in everything which they said against the person alleging the false oath,[70] and the court carefully discriminates between attaint and writ of error, for it is not sufficient in error to assign *in omnibus erratum est,* but some certain matter should be assigned. Our law as to specifications of error has a long and illustrious descent.

To the proposition now urged upon the Yorkist judges, that the effect of the attaint ought not to go further than necessary and ought simply to reverse a judgment founded upon a verdict which has not changed the possession, a majority of the Common Bench, among whom was Littleton, the author of the Tenures, held that the verdict of the twenty-four attainting the former verdict required the judgment to be entered that would have been first entered if the jury had found truly.[71]

It was about this time (1470) that Chief Justice Fortescue was writing his book *De Laudibus Legum Angliae.* It may be called the swan song of the old trial by the jury as witnesses. Already, as we have seen by the cases as to correspondence of allegation and proof, evidence is being offered before the jury. But this change had come imperceptibly and men then, just as now, failed to see the inevitable results of a great change. Fortescue has left us a very noble and eloquent plea for the old system. He points out as one of the advan-

[68] Y. B. 14 Edward III, 41. Technically, this judgment is correct, for a tenant in tail by collusion could let the verdict go against him and then release his right to bring attaint and absolutely bar the heir in tail as to the land.

[69] Y. B. Mich. 46 Edward III, D. 5. This case is noted in Statham's Abridgement. And here let me draw attention to the translation of Statham by Margaret Center Klingelsmith. The edition is a marvel of industry and scholarly devotion, even if one cannot always agree with the translation or the notes.

[70] Y. B. 6 Edward IV, 5, Fitzh. Attaint. 7.

[71] Y. B. 8 Edward IV, 8, Fitzh. Attaint, 8. Littleton, Needham and another justice held where a man brought a formedon and the tenant pleaded a release and the jury found for the release, that although the verdict did not change the possession, yet upon a verdict in attaint as to the release that the jury made a false oath, the demandant shall recover the land; and so in debt, if a man is barred of his debt alleged and he assigns a false oath on the verdict and the attaint finds with him, he shall recover his debt. But Danby, a great name in English law, and another judge said that the judgment on the first action was that the demandant take nothing wherefore he shall be restored to his cause of action but not to the land for he has not lost it. But the others said as before.

tages of jury trial in determining questions of fact over the method of the civil law, where the tribunal hears witnesses and where two witnesses to a fact are sufficient, that any litigant can find two men who are ready, for fear or favor, to go counter to the truth in anything. He scouts the idea that oral testimony can be relied upon, as compared with the English jury of witnesses, twelve in number, chosen by a public official from among men of property of the vicinage, who are subject to challenge and act under the sanction of an oath, whose verdict may be attainted if untrue by the verdict of twenty-four of the leading men in the vicinity. He says that on a trial witnesses may be heard, but the jury know all that the witnesses can tell them, and he does not add what he no doubt knew, that the English law discouraged the production of witnesses.[72]

The early history of the jury system affords a study of the inevitable tendency to overload an efficient remedy. When the assize was invented every thinking person was disgusted with trial by witnesses produced by the party. As a judge in an early Year Book says the compurgating witnesses were rascals. The contempt for witness testimony long endured in English law and is nowhere shown more strongly than in Fortescue's *De Laudibus*. The assize substituted twelve sworn and indifferent witnesses who knew the facts. The remedy was theoretically confined to proof of events supposed to be within the knowledge of the twelve men summoned. The extensions to other remedies were at first confined to proof of such events. Bracton shows that the reason for the degrees in disseisin was that the jury would not know facts so remote as those beyond the degrees. But the legislature paid no attention to this obvious consideration and extended the twelve witnesses to the most remote happenings. The functions of the jury became so overloaded that it could no longer respond as witnesses but must make inquiries of other witnesses. The transformation was assisted by the growing complexity of human life and intercourse and growing trade and commerce. The results were (1) all sorts of wrong influences exerted upon the jury, and, (2) the production of witnesses in court. These results were actually the creation of a wholly anomalous and irresponsible body which was not bound by the testimony although it received testimony. The attaint was also overloaded and became unworkable. The trouble with the jury system for over two hundred years was not that people were necessarily less honest than they are today, but that the jury of twelve witnesses was called upon to perform a task wholly unsuited to its method of selection and de-

[72] See 10 Illinois Law Rev. 549, 550.

liberation. We can plainly see today that as soon as the jury began to hear evidence as a judicial body, its function as a witnessing body, pure and simple, through the knowledge of its members was no longer being performed. As a judicial body its deliberations required strict control by the court, not by another jury of twenty-four. Still the law continued to regard the jury in two wholly irreconcilable ways and it was asked to perform a task for which it was never designed. This was the actual situation when Chief Justice Fortescue was sounding the praises of the old jury of witnesses.

The doom of the practice of attaint is evident, though it took many years to find it out. The production of evidence to a jury had begun with written evidence. The entering wedge was shown by the ruling that the jurors could not be attainted for relying upon the witnesses to a deed. Now came a ruling that in attaint where a party gives in evidence a record which was not shown to the petty jury, it will be a good plea for the petty jury on trial for a false oath to say that this record was not shown to them, for they will not be driven to take notice of something not shown to them.[73] This is the end of the attaint. No longer did the twenty-four come to say what was the fact and to pass upon the first jury's verdict only incidentally. Now they are trying the jury as a judicial body which hears and passes upon evidence. The staple of litigation has changed to the minds of men. Life is no longer so simple as before. Commerce and trade, the growing wealth of the community, the abolition of villenage, the growth of towns and cities, have made life complicated. No longer is litigation concerned with matters that all the neighbors know and of which the jury must speak truly at their peril. Now the neighbors have become a body who hear evidence and decide from the evidence. The attaint jury was now itself hearing evidence and from that evidence trying the mental processes of the petty jury and deciding whether they acted reasonably on the evidence which they had.

The law, which is always more reasonable than it seems, recognized the obvious change to a certain extent. The judges could not shut their eyes to what was happening in court before them. They could not hold a jury guilty of perjury when they had seen that jury listening to conflicting evidence and trying to ascertain the truth. The courts soon were holding that the plaintiff in attaint cannot give more in evidence to the attainting jury than he presented to the first jury. He cannot bring forward additional witnesses. Yet, on the other hand, the issue being yet clouded with the idea that the at-

[73] Fitzh. Attaint 9; Y. B. Hil. 7 Edward IV, 29.

tainting jury are passing upon the actual fact, the defendant in attaint may offer more evidence than was given to the first jury in order to show that the first verdict was correct. The law is always more practical than logical and was driven to a wholly illogical compromise. It allowed the parties to try the truth of the first verdict, but tied the hands of one of the parties; this it did in deference to its other and wholly contradictory theory, that it was trying the fairness of the first jury's mental processes. Judges were now telling the twenty-four gentlemen on the attainting jury that they must look to the evidence given to the first jury, and if that was sufficient to justify their verdict, it was immaterial what the truth was. This was no doubt the law, but it is a curious thing to say to a jury which was asked by the writ and sworn by their oath, to find the truth as to the actual fact.[74] The court in effect charged that the oath was immaterial. In order that the law be consistent, the attainting jury should have been asked to say, first, was the verdict true and, second, was it arrived at reasonably. If not true but arrived at reasonably, the judgment should have been reversed but the jury acquitted. This obvious solution did not occur to the judges of that age, for the reason that they talked only in termsof precedent and they could not understand the changes that had come over the jury trial. It may be that the liberal minded lawyers of the Renaissance would have remedied the matter, but with the advent of the Stuart Kings, the sanctity of the jury became a political issue and it triumphed with the downfall of the Stuarts.

As soon as the jury trial changed its character, there was apparent a practical difficulty in the administration of the law. The attainting juries would not convict the petty juries. "The gentlemen," says Sir Thomas Smith, "will not meet to slander and deface the honest yeomen, their neighbors, * * * and if (they) do appear, gladlier will they confirm the first sentence."[75] This was bound to be so, but all the time the clamor went up to parliament against the gross and horrible perjuries of the petty jurors, from men who were losing cases. The courts gave a remedy for setting aside a verdict for misconduct of the jury after they had assembled in court.[76] but the only remedy for other misconduct was the attaint. At last the wise men in parliament reached the conclusion that the severity of the punishment was deterring attainting juries from finding the

[74] Rolfe v. Hampden, 1 Dyer 53b. The Justice Shelley in this case was an ancestor of the poet Shelley and seems to have had some of his curious contradictions in reasoning.

[75] Quoted Thayer, Treat. Evid. 153.

[76] See 10 Illinois Law Rev. 553, note 25.

petty juries guilty of a false oath, and a law was passed as a temporary expedient, continued by later acts, revived under Henry VIII and made permanent under Elizabeth, for lightening the punishment to a fine.[77]

But the fault was not in the punishment, for the attaint became less and less workable. The fact was that the tribunal of twenty-four, when it came to a question of hearing evidence and passing upon the reasonableness of the petty jury's conduct, was not a proper tribunal. They would naturally assume that the petty jury acted fairly, to the best of its knowledge and mental capacity and since they could not find the issue differently, without convicting the petty jurors of a crime, they allowed the one issue to outweigh the other. Only in cases of manifest corruption would there be a chance for a verdict for the plaintiff in attaint. Yet the technical rules were made all the more stringent, so that the greatest lawyer of Elizabeth's reign goes so far in his reports as to say that the attaint was such that a jury could be convicted though every word in their verdict was true.[78] The courts extended the remedy as far as they could by holding cases within the equity of the statute, giving the attaint against the heir and against the executors of the tenant of the land under the verdict, thus reversing older cases.[79]

But notwithstanding that juries were hearing evidence as judicial bodies, the courts kept on saying that a jury might find the facts of its own knowledge. Yet at the same time, the courts were fining them for finding contrary to the evidence given in court. The judges were hopelessly entangled in the maze of the two conflicting theories, for as against the practice of fining juries, it was urged that for an incorrect verdict the attaint lay and that it was a remedy. The courts, as they often have done, tried to ride two horses going in exactly opposite directions. The fact was that the judges under Henry VII and Henry VIII were bewildered in the presence of a phenomenon which had taken all the life out of the attaint. As long as the jury was considered as finding the facts from their own

[77] Stat. 11 Henry VII, cap. 24; 23 Henry VII, cap. 3; 13 Eliz., cap. 25.

[78] Plowd. 292. The case he cites is one in 49 Henry VI, where an abbot, as parson of a certain church, held an annuity by prescription in right of his parsonage. He sued for it and counted on the annuity as due to him and his predecessor abbots by prescription not naming himself as parson. The prescription was traversed and he proved an annuity by prescription, but not due to him as parson. The jury found for him and was attainted. Plowden is wrong. The jury found contrary to the fact alleged, for the abbot on the record could have brought another action for the annuity owed to him as parson. Even great lawyers like Plowden are sometimes found slumbering.

[79] According to Plowden, 86, citing 6 and 7 Edward VI, attaint statutes are not to be extended by equity of the statute. Contra, Moore, 17, note 60, citing the Easter term of the 3 Elizabeth.

knowledge, the courts were powerless to revise their finding, but must use the attaint jury. Perchance, the jury knew much more than was spoken in court and only an attaint jury could tell this. But now stepped in the court of chancery, with its jurisdiction for granting a new trial of an action at law. It had no difficulty in acting upon the assumption that the evidence that had been given in court was all the evidence that the jury had. At last, in the presence of this competing jurisdiction, stimulated by the jealousy felt both by judges and the common law bar against the equity courts, which were stealing so much of their jurisdiction and emoluments, a great light burst upon the common law courts, and, under the Commonwealth, they began to grant new trials. But the development had been such that the courts, in applying the new trial proceeding, went only as far as the equity courts and granted a new trial without substituting the proper judgment.

It needs no analysis to show that the passing upon the verdict by a motion for a new trial, presupposes that the jury's action is to be judged as if the court had before itself the evidence given in open court and no other, and the ruling is to be made thereby. Granted that the jury have acted upon facts and knowledge not disclosed in the evidence but known to some of them, the motion for a new trial becomes at once from a logical standpoint an utter absurdity and the courts are back where they were under Henry VIII and Henry VII, when they were trying to make the practice of attaint cover two absolutely contradictory theories of a jury's verdict. The attaint perished because too great a work was unthinkingly put upon it. Yet such is the persistence of error in repeating the *cantilena* of the law, that Chief Justice Vaughn in his immortal judgment in Bushell's case,[80] which is one of the bulwarks of our liberties, gave as the controlling reason why a court could not punish a jury for bad judgment or a perverse verdict without evidence of actual misconduct, the wholly absurd reason that the jury found a verdict from their own knowledge, as well as from the evidence. Vaughn was still so entangled in the two contradictory theories as to assert in one breath that a juryman is not a witness because he "swears to what he can infer and conclude from the testimony" and in the next breath that the law supposes him able to decide the case, although no evidence whatever be given, and therefore he is a witness. As a reasoning animal, the learned Chief Justice must have come out of Bedlam.[81] But for two hundred years this opinion has continued to be

[80] 6 State Tr. 999; Vaughn's Rep. 135.

[81] Thayer in Treat. Evid. 169, speaks of "the keen arguments" in Vaughn's opinion!

repeated and today a vast mass of precedent could be cited against giving to courts the power upon granting a new trial to enter the proper judgment.

As soon as it was determined that the jury were a judicial body passing upon the evidence given before them in open court, the courts began their constructive work in creating that vast body of the rules of evidence, whereby it could be assured that juries would be subjected only to the influence of evidence proper for them to consider. It is more than a coincidence, it is an historical necessity, that our rules of evidence date from the period when the jury became a judicial body and the granting of new trials began.

True it is that the rule as to the sanctity of the written document against attack by oral evidence, comes out of the Middle Ages. But this is so because, whether a jury be witnesses or judges, the written document must govern the evidence. Just as when the jury were witnesses making up the verdict from their own knowledge and what they could gain by private inquiry, they were guarded against improper influences out of court by the strict rules against champerty, embracery and maintenance,[82] so after 1655, when they had become judges of the evidence, rules were necessary to prevent them from being influenced by improper suggestions made in court.

And now to the moral that is to be extracted from this long tale. Today the greatest evil in the administration of the law is, first, that the judge, during the trial, has not enough control over the jury; and, second, after the verdict, has not power to correct it, by entering the proper verdict and thus ending the litigation with power in the Appellate Court to review the ruling and to make the proper judgment in the case. If this were possible a great part of the appellate jurisdiction, which is taken up with passing upon questions of admission and exclusion of evidence and of instructions to juries in lower courts, would at once be swept away. Upon this question the history of attaint is very instructive. It is the substance of things that we must look to, not the form. Once our courts of common law, by a summary process, could correct a mistake in the finding of a jury and at once substitute the proper finding and judgment thereon. This power the common law ought never to have lost, but in our progress toward free government, the sanctity of the jury's verdict became exaggerated out of all proportion to its merits. The

[82] See 10 Illinois Law Rev. 552, for the reasons for the rules against champerty, maintenance and embracery. But it is to be said that the law today punishes any one who attempts to talk to or influence a jury out of court, just as it did when the jury were witnesses. But under the old rule a party could go to the jury out of court and state to them his evidence. In no other way could he tell the jury his facts.

sanctity of the verdict served a great and useful purpose in the struggle for liberty and free institutions, which are more important than any procedure, but now the day has come when democratic government must furnish proof of its right to exist by furnishing justice according to law. Aristotle long ago said that governments exist for noble deeds, and the noblest and highest duty that the government can perform is that of furnishing to its citizens justice that is given in accordance with law that is equal for all. It is no answer to this demand upon government to say that every litigant has the constitutional right in a law case to have a jury make an incorrect finding on the issue, that cannot be corrected except by the long and expensive process of a new trial, which again may eventuate in another incorrect finding. It is giving weight enough to the verdict for the court to say that it will not set aside the verdict except when against the weight of the evidence.

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